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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE CITY AND COUNTY OF SAN
FRANCISCO, CALIFORNIA and THE
PEOPLE OF THE STATE OF CALIFORNIA,
Acting by and through San Francisco City
Attorney DENNIS J. HERRERA,

Plaintiffs,

vs.

PURDUE PHARMA L.P., et al.,

Defendants.

) Case No. 3:18-cv-7591-CRB

) CLASS ACTION

) PLAINTIFFS' REPLY REGARDING
) PROPOSED DISCOVERY SCHEDULE

) JUDGE: Hon. Charles R. Breyer

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1 **I. INTRODUCTION**

2 This lawsuit seeks to address the ongoing public health emergency facing San Francisco
3 that is the opioid crisis. This epidemic has strained San Francisco’s public resources, including its
4 Department of Public Health. Now, with the spread of COVID-19 and the aggressive measures
5 San Francisco and California have taken in response in just the last week, we find ourselves in the
6 midst of another public-health emergency. The City’s limited public health resources are doubly
7 taxed.

8 Plaintiffs the City and County of San Francisco, California (“San Francisco” or the “City”)
9 and the People of the State of California, acting by and through San Francisco City Attorney
10 Dennis J. Herrera (the “People”) (collectively, “Plaintiffs”) noted in their Proposed Discovery
11 Schedule filed March 13, 2020, that COVID-19 may affect San Francisco’s ability to keep pace
12 with their proposed discovery plan. ECF No. 129 at 1 n.1. Since then, circumstances have
13 significantly changed. San Francisco has escalated its response to the pandemic, issuing a shelter-
14 in-place order – the first in the nation – that, among other things, closes non-essential business. At
15 the time of Plaintiffs’ initial filing there were 18 reported COVID-19 cases; that number has risen
16 exponentially to 178 in the City and 976 in the nine-county Bay Area with Mayor London Breed
17 warning Monday that “the worst is yet to come.” In addition, it has become clear that most, if not
18 all, of San Francisco’s key custodians with discoverable information for this action are on the
19 frontlines of the City’s response. Thus, the exigencies of addressing COVID-19 have made an
20 immediate start to Plaintiffs’ discovery unworkable. Given this rapidly changing landscape and
21 the significance of the next few weeks, Plaintiffs agree with Defendants that – at least with respect
22 to some deadlines – it makes sense to pause 30 days before proposing a revised discovery and trial
23 schedule. At that time, the parties can submit status reports on how best to proceed in light of the
24 information that becomes available.

25 That said, while the parties and the Court are wading in unfamiliar territory, it is important
26 that we continue to move this litigation forward wherever it is possible to do so. The opioid
27 epidemic continues to cause San Francisco significant harm.

II. ARGUMENT

In Sections C and D, below, Plaintiffs detail their proposal for advancing this case now. For context, however, it is important to note that a number of the contentions underlying Defendants’ response – including the scope of the First Amended Complaint (“FAC” (ECF No. 128)) and the discovery it reasonably implicates – are exaggerated or false.

A. The FAC Is Indisputably Streamlined

The FAC is narrower and more focused than its predecessor. Defendants’ claims to the contrary rest on an inapposite comparison to the *original* complaint in this action, which, as Defendants elsewhere acknowledge, was *not the operative complaint*.¹ Plaintiffs previously took advantage of the Short Form Amendment procedure established by Judge Polster, and in so doing, incorporated by reference their “own prior pleadings *and* the common factual allegations identified and the RICO causes of action included” in the multidistrict litigation (“MDL”) bellwether *County of Summit, Ohio v. Purdue Pharma L.P.*, Case No. 1:18-op-45090-DAP (N.D. Ohio) (“*Summit County*”) complaint. *See* ECF No. 66-1, Ex. A (“Short Form Complaint”) (emphasis added). San Francisco’s FAC, like its Short Form Amended Complaint, closely tracks the relevant allegations and claims in *Summit County*, which was the subject of numerous dispositive orders by Judge Polster. *See* ECF No. 128 at 3 n.4 (noting that the FAC closely tracks *Summit County*); ECF No. 133 at 2 n.1 (acknowledging the FAC largely follows the *Summit County* complaint). Although the FAC is modeled after the *Summit County* complaint, it has narrowed the issues by alleging fewer claims against fewer defendants. For example, the FAC eliminates all claims against two defendants Hikma Pharmaceuticals plc and West-Ward Pharmaceutical Corp. (while adding a single claim against Walgreen Co. (“Walgreens”)), and eliminates five causes of action: public

¹ *See, e.g.*, ECF No. 133 at 2-3 (arguing the FAC “has ballooned by 125 new pages” and is “80% longer than its predecessor” based on a comparison of ECF No. 128 (the FAC) with ECF No. 1 (the original complaint)).

1 nuisance on behalf of San Francisco, negligence, negligent misrepresentation, fraudulent
 2 concealment, and one of the three RICO causes of action previously pled or incorporated.²

3 **1. The FAC Reduces the Categories of Relief Plaintiffs Seek,**
 4 **Thereby Reducing the Scope of Case-Specific Relevant**
 5 **Discovery**

6 Another way Plaintiffs have streamlined the FAC is by limiting the scope of damages and
 7 other remedies they seek, which will help limit the scope of discovery in this case. Defendants'
 8 reliance on Plaintiffs' Fact Sheet (ECF No. 66-2, Ex. B) – which predates the operative complaint
 9 – has led Defendants to identify numerous categories of remedies that Plaintiffs no longer seek,
 10 which, in turn, has led Defendants to suggest wide-ranging discovery of subject matters that are
 11 no longer germane. ECF No. 133 at 7-11. In the MDL, Plaintiff Fact Sheets served as
 12 replacements for initial disclosures. Plaintiffs submit that the same should be true here.
 13 Accordingly, Plaintiffs are willing to amend their Plaintiff Fact Sheet to eliminate any confusion
 14 as to what remedies Plaintiffs seek. It is unnecessary, however, that this occur prior to the initiation
 15 of new discovery. ECF No. 133 at 17. Plaintiffs will propose a date by which their Plaintiff Fact
 16 Sheet will be amended in the supplemental status report within 30 days. Proceeding by amending
 17 the Plaintiff Fact Sheet instead of serving initial disclosures and doing so substantially after April
 18 1, 2020, are necessary given the present and appropriate focus of key City Departments' personnel
 19 on responding to the COVID-19 pandemic.

20 As reflected by the FAC (and Plaintiffs will amend the Plaintiff Fact Sheet to conform),
 21 Plaintiffs *do not* seek the following damages identified by Defendants:

- 22 • Increased costs related to an increase in criminal investigations, task forces, opioid-
 23 related crimes, or threats to public safety;
- 24 • Increased costs resulting from increases in adult and juvenile detention;
- 25 • Increased costs related to increased criminal prosecutions and public defense costs,
 26 drug courts and related programs;

27 ² Compare FAC, §III (identifying Defendants) and ¶¶826-925 (stating five causes of action)
 28 with Short Form Complaint, §I (Short Form Amended Complaint identifying all defendants and
 causes of action asserted by Plaintiffs).

- Increased costs related to first responders’ counseling for grief, post-traumatic stress disorder and depression;
- Increased Veterans Services expenditures; and
- Increased costs related to foster care, child support, family and children’s services and Family Treatment Court and related programs.

ECF No. 133 at 7-11; ECF No. 128 at 257-84.

To be sure, the harms felt by San Francisco and its residents with respect to the above-identified services are severe. Plaintiffs’ decision to omit the above damages – in addition to many others – reflects their conscientious effort to streamline the complaint. *See* ECF No. 128 at 257-84. Discovery should be informed by the remedies sought, and therefore, should be more limited than what Defendants propose.

2. Plaintiffs Elected to Follow the *Summit County* Complaint to Reduce Wasteful and Repetitive Motion Practice

Defendants’ false framing of the FAC as “expand[ing] the complexity of th[is] case significantly” is purposeful. ECF No. 133 at 2. It animates their contention that they are operating on a blank slate and are entitled to wholesale, unfettered motion practice. They contend that this Court should examine the FAC in a vacuum, ignoring extensive briefing and opinions that already inform the legal issues and evaluate defendant-centric facts also at issue here. This contention runs counter to the Court’s statement of intention to use the substantial work that has already been entered in the MDL litigation as a “springboard” for proceeding in this action. ECF No. 114 (Feb. 26, 2020 Hr’g Tr.) at 9:5-23. Moreover, it is well established MDL practice that prior rulings already entered by the transferee court not be relitigated. *See* Feb. 26, 2020, Hr’g Tr. at 9:5-9; David F. Herr, Multidistrict Litigation Manual §10.5 (May 2019 Update) (“The transferor court . . . receives the cases in the condition they are in at the time of remand. Decisions that have been made in the case continue to apply unless circumstances change warranting their modification.

1 The decisions made by the transferee court are considered ‘law of the case.’’); MDL ECF No.
2 3052 (Evidentiary Order) (same).³

3 Defendants tested the *Summit County* allegations numerous times, and the factual
4 allegations and types of claims Plaintiffs adopted here survived those tests. First, the claims
5 survived Defendants’ Fed. R. Civ. P. (“Rule”) 12(b)(6) motions. Each of the Defendants in this
6 action filed a motion to dismiss the *Summit County* complaint, and every one of those motions was
7 almost entirely denied in a more than 50-page report and recommendation issued by the MDL
8 magistrate judge. *In re Nat’l Prescription Opiate Litig.*, No 1:17-md-02804, 2018 WL 4895856
9 (N.D. Ohio Oct. 5, 2018) (granting in part and denying in part defendants’ motions to dismiss).
10 The parties then briefed objections to the magistrate judge’s order, which Judge Polster considered
11 and resolved in a 21-page opinion resolving the Rule 12(b)(6) motions. *In re Nat’l Prescription*
12 *Opiate Litig.*, No 1:17-md-02804, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018) (adopting in part
13 and rejecting in part the report and recommendation). Judge Polster also resolved Rule 12(b)(1)
14 motions brought by Mallinckrodt plc, Allergan plc, and Teva Pharmaceutical Industries Ltd. MDL
15 ECF Nos. 2131, 2673.

16 Second, Judge Polster then ruled on 27 summary judgment motions, the vast majority
17 brought by Defendants. ECF No. 82 at 2-3. A number of the summary judgment motions asked
18 Judge Polster to decide the law across an industry-wide set of facts, and the MDL court did so.
19 The majority of the resulting opinions relate directly to legal issues applicable here, and apply *the*
20 *same facts* this Court would examine. By way of example, the MDL court issued opinions that:

- 21 • Denied federal preemption of state law claims and federal preclusion of federal
22 claims (*In re Nat’l Prescription Opiate Litig.*, No 1:17-md-02804, 2019 WL
4178591 (N.D. Ohio Sept. 3, 2019));
- 23 • Denied three related summary judgment motions filed by Defendants relating to
24 causation (*In re Nat’l Prescription Opiate Litig.*, No 1:17-md-02804, 2019 WL
4178617 (N.D. Ohio Sept. 3, 2019));

27 ³ References to “MDL ECF No.” are to the docket entries in *In re Nat’l Prescription Opiate*
28 *Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio).

- 1 • Denied the Manufacturer, Distributor, and Pharmacy Defendants’ summary
2 judgment motions on statute of limitations (*In re Nat’l Prescription Opiate Litig.*,
No 1:17-md-02804, 2019 WL 4194296 (N.D. Ohio Sept. 4, 2019));
- 3 • Denied the Manufacturer Defendants’ summary judgment motion on Plaintiffs’
4 public nuisance claims (*In re Nat’l Prescription Opiate Litig.*, 406 F. Supp. 3d 672
(N.D. Ohio 2019)); and
- 5 • Denied multiple summary judgment motions on Plaintiffs’ RICO claims (*In re*
6 *Nat’l Prescription Opiate Litig.*, No 1:17-md-02804, 2019 WL 4279233 (N.D.
7 Ohio Sept. 10, 2019)).⁴

8 Judge Polster also granted a summary judgment motion brought by plaintiffs concerning
9 Defendants’ duties under the Controlled Substances Act, which, as in the first bellwether action,
10 will be of critical importance here. *In re Nat’l Prescription Opiate Litig.*, No 1:17-md-02804,
11 2019 WL 3917575 (N.D. Ohio Aug. 19, 2019).

12 Many of the defendant groups present in this court also filed unsuccessful individual
13 motions for summary judgment in the MDL. *See, e.g., In re Nat’l Prescription Opiate Litig.*, No.
14 1:17-md-02804, 2019 WL 4178608 (N.D. Ohio Sept. 3, 2019) (denying the “Teva and Actavis
15 Generic Defendants’ Motion for Summary Judgment”); *In re Nat’l Prescription Opiate Litig.*, No.
16 1:17-md-02804, 2019 WL 4178613 (N.D. Ohio Sept. 3, 2019) (denying “Mallinckrodt’s Motion
17 for Partial Summary Judgment”); *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804, 2019
18 WL 4194279 (N.D. Ohio Sept. 4, 2019) (denying “Walgreen’s Motion for Summary Judgment”);
19 *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804, 2019 WL 4194293 (N.D. Ohio Sept.
20 4, 2019) (denying “Defendants Janssen Pharmaceuticals, Inc. and Johnson and Johnson’s . . .
21 Motion for Summary Judgment”). The other Defendants relied upon the consolidated group
22 motions such as those identified in the bullet points above, which also failed. These rulings are
23 the “springboard” for this action.

24 _____
25 ⁴ Beyond the denial of motions to dismiss and motions for summary judgments provided as
26 examples above, the Northern District of Ohio website lists **more than 80** opinions and orders
27 issued by that Court in the MDL from which this case was remanded. *See MDL 2804 National*
28 *Prescription Opiate Litigation*, U.S. District Court for the Northern District of Ohio,
<https://www.ohnd.uscourts.gov/mdl-2804> (last visited Mar. 24, 2020). Unsurprisingly,
Defendants would rather have this Court not examine the facts the MDL court examined, and not
be informed by the law the MDL court considered.

1 Defendants' characterization of the FAC as presenting new and previously unknown
 2 allegations is not only false, it is an attempt to undo the work already done in this action. Plaintiffs
 3 chose to amend in this manner precisely to avoid relitigating issues previously decided by Judge
 4 Polster, and specifically did so in light of this Court's intention not to "review or alter" "rulings
 5 [that] have already been entered in the MDL litigation." ECF No. 114 (Feb. 26, 2020 Hr'g Tr.) at
 6 9:5-13. The FAC shares the *Summit County* complaint's DNA. While the San Francisco-specific
 7 facts differ from Summit County-specific facts, the allegations against Defendants are nearly
 8 identical because their marketing and distribution practices were the same everywhere in the
 9 nation.

10 Rather than filing an onslaught of motions to dismiss, Defendants should be ordered to
 11 demonstrate why differences in law, or applicable facts, compel a result different than the
 12 transferee MDL court has already found with respect to the same issues. *See, e.g., In re Worldcom,*
 13 *Inc. Sec. Litig.*, No. 02 Civ.3288 DLC, 2003 WL 21357026, at *1 (S.D.N.Y. June 11, 2003)
 14 (requiring plaintiffs to "show cause" why previously-issued orders in an MDL should not apply to
 15 their newly-filed cases as well). Specifically, Plaintiffs assert five causes of action: two RICO
 16 claims already upheld at the motion to dismiss and summary judgment stages in the MDL;⁵ a
 17 public nuisance claim upheld at the motion to dismiss and summary judgment stages in the MDL;⁶
 18 and California Unfair Competition Law and False Advertising Law claims upheld by a California
 19 court presiding over substantially similar proceedings brought by the Counties of Santa Clara,

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 24 ⁵ *Nat'l Prescription Opiate Litig.*, 2018 WL 6628898 (motion to dismiss); *Nat'l Prescription*
Opiate Litig., 2019 WL 4279233 (summary judgment).

25 ⁶ *Nat'l Prescription Opiate Litig.*, 2018 WL 6628898 (motion to dismiss); *Nat'l Prescription*
 26 *Opiate Litig.*, 406 F. Supp. 3d 672 (summary judgment). While public nuisance is a creature of
 27 statute law and therefore differs somewhat from state to state, to the extent California public
 28 nuisance law varies from Ohio public nuisance law, California law is only more plaintiff friendly.
 Given that the public nuisance allegations in the Ohio case survived a Rule 12(b)(6) motion, they
 would certainly meet the lower bar for surviving a similar motion under California law.

1 Orange, and Los Angeles, and the City of Oakland.⁷ The international Defendants' motions to
 2 dismiss for lack of personal jurisdiction were also denied by the MDL.⁸

3 To the extent Defendants believe these rulings should be revisited, they should be required
 4 to identify at the beginning of any motion to dismiss filed in this Court the changes or extraordinary
 5 circumstances that justify revisiting the existing rulings. This procedure honors the role of the
 6 transferee court in an MDL proceeding and will substantially reduce the burden on the Court and
 7 the parties. David F. Herr, *Annotated Manual for Complex Litigation* §20.133 (4th ed. May 2019
 8 Update) (citing Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor*
 9 *Courts and Transferee Courts*, 78 F.R.D. 575, 577 (J.P.M.L. 1978) ("If transferor judges were
 10 permitted to upset rulings of transferee judges, the result would be an undermining of the purpose
 11 and usefulness of transfer under Section 1407 for coordinated or consolidated pretrial proceedings
 12 because those proceedings would then lack the finality (at the trial court level) requisite to the
 13 convenience of witnesses and parties and to efficient conduct of actions."))). Reinventing the
 14 wheel by permitting Defendants to move to dismiss on issues that have already been resolved is
 15 improper and wasteful. See 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and*
 16 *Procedure* §3867 (4th ed. Aug. 2019 Update) ("[E]xceptions to the law of the case principle should
 17 be especially rare in these circumstances, because refusal to follow the previous ruling would result
 18 in the sort of piecemeal decision making that MDL centralization is intended to avoid."); *McKay*
 19 *v. Novartis Pharm. Corp.*, 751 F.3d 694, 705 (5th Cir. 2014) ("[t]he law of the case doctrine
 20 requires attention to the special authority granted to the multidistrict transferee judge and ensures
 21 that transferor courts respect the transferee court's decisions") (citation omitted).

23 ⁷ Minute Order at 2, *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC (Cal
 24 Super Ct., Orange Cty. Feb. 13, 2018), ECF No. 984; Minute Order at 3, *People v. Purdue Pharma*
 25 *L.P.*, No. 30-2014-00725287-CU-BT-CXC (Cal Super Ct., Orange Cty. Jan. 26, 2018), ECF No.
 964.

26 ⁸ *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804, 2019 WL 3553892 (N.D. Ohio
 27 Aug. 5, 2019). Notably, Plaintiffs sought discovery necessary to prove jurisdiction over these
 28 entities at trial, but their motions for such discovery were denied. This is one, non San Francisco-
 specific area for which Plaintiffs will need additional discovery in this action from certain
 Defendants.

Under law-of-the-case principles, the rulings of an MDL court presumptively govern with respect to common issues and are subject to reconsideration only in extraordinary circumstances involving changed law or facts or manifest injustice. *See generally Everett v. Pitt Cty. Bd. of Educ.*, 788 F.3d 132, 142 (4th Cir. 2015) (“Once a court has established law of the case, ‘it must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal . . . unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice.’”) (quoting *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999)).

Accordingly, Plaintiffs propose that by April 10, 2020, Defendants file one 50-page omnibus motion to dismiss raising only those issues not previously addressed in the MDL. Plaintiffs request an order requiring the motion to state at the outset: (1) that each issue raised as a basis for dismissal is either novel and not covered by holdings in the MDL; or (2) to the extent related to an issue previously addressed in the MDL, what changed or extraordinary circumstances permit them to revisit law of the case and compel a determination of that issue different from that already rendered in the MDL. Plaintiffs further propose that they file a 50-page omnibus opposition and that Defendants file a 20-page omnibus reply in accordance with the schedule set forth below. Plaintiffs further request that the Court avoid duplicative briefing by allowing incorporation of similar arguments made in the MDL by reference.⁹

B. Discovery Will Be Circumscribed

The FAC narrowed the claims and relief sought, and discovery should be limited accordingly. Generally speaking, Plaintiffs seek: (a) the forward-looking costs of abatement of the public nuisance in San Francisco caused by opioids; (b) civil penalties and injunctive relief tethered to Defendants’ violations occurring within San Francisco of the Unfair Competition Law

⁹ Plaintiffs note, however, that to the extent any Defendant seeks to file a motion to dismiss for lack of personal jurisdiction, jurisdictional discovery may need to be conducted before a ruling can be issued. That fact has nothing to do with the coronavirus, but is instead a result of Defendants’ ongoing delays and refusals to comply with discovery orders issued in the MDL.

1 and False Advertising Law; and (c) limited remedies under RICO. A large volume of discovery
2 has already been exchanged in the MDL that will bear on these issues. Further productions in the
3 MDL are also forthcoming. Thus, at this time, Plaintiffs anticipate that discovery here will target:
4 (i) sales marketing activity in San Francisco; (ii) suspicious order monitoring and diversion in and
5 around San Francisco; (iii) activities of opioid front groups and key opinion leaders and the effect
6 on practices in San Francisco; (iv) facts relevant to personal jurisdiction over certain foreign
7 Defendant parent corporations; and (v) expert analyses and opinions regarding the effects of the
8 opioid crisis on San Francisco. *See* ECF No. 67 at 3.

9 In their response to Plaintiffs' Proposed Case Schedule, however, Defendants
10 mischaracterize the discovery burden by addressing numerous categories of past damages reflected
11 in Plaintiffs' year-old Fact Sheet filed in the MDL, which, as noted above, Plaintiffs will amend
12 in due course. *See* ECF Nos. 66, 66-2. In the FAC, Plaintiffs limited the past damages they seek
13 to only those categories Judge Polster upheld as recoverable under RICO.

14 Nor is Defendants' estimate of the number of City departments that should be subject to
15 discovery reflective of the claims at issue or the relief sought through them. It is undoubtedly true
16 that the opioid epidemic has had a profound impact on San Francisco, but litigation of this case
17 does not require the attention of 42 City departments, as Defendants contend. *See* ECF No. 133.
18 at 6 n.9. Certain departments that Defendants identified surely will offer relevant discovery – for
19 example, the Department of Public Health, Department of Homelessness and Supportive Services,
20 Police Department, Fire Department, Sheriff's Department, and Adult Probation. Many others
21 within Defendants' list, however, offer very limited relevant information at best or only
22 information that is cumulative to that of the departments that are core to this litigation. Just to
23 begin, discovery should not be necessary from the Child Support Services, Department of Children
24 Youth and Families, County Clerk, District Attorney, Environmental Department, Housing
25 Authority, Human Rights Commission, Public Defender, Office of Short Term Rentals, Office of
26 Economic and Workforce Development, Office of Public Finance, Veterans Affairs Commission,
27 and Superior Court, among others. Plaintiffs are prepared to work collaboratively with Defendants
28 to prioritize discovery into the departments that are most relevant.

1 Finally, Plaintiffs have serious concerns about Defendants' intention to take voluminous
 2 third-party discovery. *See* ECF No. 133 at 9-13. Plaintiffs expect Defendants will meet and confer
 3 before propounding third-party discovery, especially because it is unclear why Defendants will
 4 require discovery from so many public health agencies, professional regulatory authorities,
 5 insurance providers, professional organizations, and healthcare providers. Not including
 6 Defendants' allusion to innumerable healthcare providers, from whom discovery is not
 7 proportional, Defendants referenced at least 30 third-party entities. The Court should not allow
 8 Defendants to employ third-party discovery to, in essence, trace the history of every single opioid
 9 prescription filled in San Francisco. Plaintiffs will, in good faith, seek to understand Defendants'
 10 purported need for discovery from each third party that Defendants identify, but Plaintiffs are
 11 firmly of the view that the core of what will be required to prove and defend this case resides with
 12 Plaintiffs and Defendants, with extant but limited need for third-party discovery.

13 **C. Much Can Be Done to Advance This Important Case, Even in These**
 14 **Uncertain Times**

15 Notwithstanding the complications that the COVID-19 pandemic imposes, there is much
 16 that can be done now, as Defendants themselves recognize. For example, Plaintiffs have already
 17 acknowledged that there may be some discrete legal issues unique to San Francisco's case that
 18 have not been resolved in the MDL and that may be the subject of briefing pursuant to Rule 12 in
 19 this case. ECF No. 67 at 2. Plaintiffs agree that such briefing can and should be submitted without
 20 delay. *See* ECF No. 133 at 16 (noting that "briefing on motions to dismiss the FAC" "should
 21 proceed").

22 To be clear, though, Plaintiffs do not concede that Defendants are entitled to re-raise every
 23 issue under the sun. Indeed, as noted above, this Court has already stated its intention "not [to]
 24 review or alter any of" the "rulings [that] have already been entered in the MDL litigation." ECF
 25 No. 114 (Feb. 26, 2020 Hr'g Tr.) at 9:5-9. This is consistent with well-established MDL practice.
 26 *See* David F. Herr, *Multidistrict Litigation Manual* §10.5 (May 2019 Update) ("The transferor
 27 court . . . receives the cases in the condition they are in at the time of remand. Decisions that have
 28 been made in the case continue to apply unless circumstances change warranting their

1 modification. The decisions made by the transferee court are considered ‘law of the case.’”); MDL
2 ECF No. 3052 (Evidentiary Order) (same). Thus, Plaintiffs propose a briefing schedule that allows
3 the parties to bring motions to dismiss of unresolved issues commencing in short order.

4 Plaintiffs also agree that certain discovery tasks can proceed swiftly. Plaintiffs are prepared
5 to begin serving their document requests by April 1, 2020, as Defendants propose, and further
6 submit that any disagreement as to the scope of such requests – including, *e.g.*, attorney meet-and-
7 confers and the submission of remaining disputes to Magistrate Judge Corley – can be resolved in
8 the manner prescribed in the Federal and Local Rules without any added delay. As an initial
9 matter, Plaintiffs propose that Defendants may together serve 25 total requests for production on
10 Plaintiffs and Plaintiffs can serve up to 10 requests for production on each Defendant family. The
11 parties can meet and confer with respect to additional discovery limitations and submit them in
12 their renewed proposed discovery and trial schedules to be submitted in 30 days or raise with the
13 Magistrate Judge if needed.

14 Finally, while some discovery may legitimately take longer than Plaintiffs initially
15 anticipated due to the COVID-19 pandemic, some documents can and should be produced without
16 delay. Specifically, Defendants are under an obligation to produce in the MDL all opioid related
17 “documents . . . that they produce in any court case, government investigation or government
18 hearing.” MDL ECF No. 2576 at 3-4 (noting that “documents produced in (for example) State-
19 court cases will also be relevant to the Track Two cases and to other MDL cases that will follow”).
20 To the extent Defendants have not yet fully complied with this directive, they should be ordered
21 to do so, and to continue doing so as additional productions are made in other litigations or
22 investigations. Because these documents have been (or will have been) gathered, formatted, and
23 reviewed for privilege, there is no reason why these productions should be disrupted or delayed by
24 pandemic-related complications. Relatedly, production of Walgreens’ dispensing data relevant to
25 San Francisco should proceed as well.

26 Discovery can also continue, to the extent it can be conducted remotely. Plaintiffs agree
27 the parties can exchange opening discovery requests and meet and confer about the scope of those
28 requests in the coming month. Plaintiffs concede that the coronavirus crisis is affecting their ability

PLAINTIFFS’ REPLY REGARDING PROPOSED DISCOVERY SCHEDULE –

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to interview possible custodians and identify sources of documents relevant to this litigation, but the crisis has not halted those efforts. Indeed, much of that work has been underway for months, and it continues now. And Defendants are subject to ongoing and preexisting obligations to produce documents that have already been identified and produced in related litigation.

D. Partial Case Management Schedule

In light of the issues identified above, Plaintiffs modify their prior discovery schedule and identify the following case management schedule. The schedule is similar to Defendants' proposal except that it adjusts the deadline for Plaintiffs' oppositions to motions to dismiss and Defendants' replies thereto by a week so that Plaintiffs have a full 30 days to respond. Plaintiffs request 30 days to propose additional dates governing the dates for discovery to trial, once more information about the likely impact of COVID-19 on the litigation schedule becomes available.

Issue	Defendants' Proposal	Plaintiffs' Proposal
Parties may serve limited document requests	April 1, 2020	April 1, 2020
Motions to dismiss (limited to issues not previously resolved)	April 17, 2020	April 17, 2020
Oppositions to motions to dismiss	May 8, 2020	May 15, 2020
Replies in support of motions to dismiss	May 22, 2020	May 29, 2020

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court adopt Plaintiffs' schedule set forth above; require omnibus briefs as specified above and limited to 50, 50 and 20 pages for motions, oppositions and replies, respectively; allow Plaintiffs' Fact Sheet, which Plaintiffs will amend, to substitute as initial disclosures as it did in the MDL with a date for amendment to be determined after 30 days; allow the parties to commence service of document requests limited at this early stage to 25 total requests for production on Plaintiffs by all Defendants

collectively, and 10 requests for production by Plaintiffs on each Defendant family; and allow the parties to submit renewed proposed discovery and trial schedules in 30 days, on April 24, 2020.

DATED: March 25, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 25, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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